COURT OF QUEEN'S BENCH FOR
SASKATCHEWAN

CIVIL PRACTICE DIRECTIVE #1

E-DISCOVERY GUIDELINES

REFERENCE: CIV-PD #1

Former Reference: Practice Directive #6 issued September 1, 2009

Effective: July 1, 2013

Introduction

1. While electronic documents are included in the definition of "document" contained in Rule 17-1 of *The Queen's Bench Rules*, Part Twenty of *The Queen's Bench Rules* relating to discovery and inspection of documents does not contemplate an electronic discovery("e-discovery") process. E-discovery refers to the preservation, retrieval, disclosure and production of documents from electronic sources and sometimes in electronic form.

2. Electronic documents differ from paper documents in a number of ways. Electronic documents now outnumber, are easier to duplicate and are more difficult to dispose of than paper documents. Electronic documents are attached to tracking information (meta-data)and may be updated automatically, unlike paper documents. In order to access an electronic document, a computer program (which may become obsolete) is required. While paper documents can be maintained in one filing cabinet or banker's box, electronic documents can reside in numerous locations such as desktop hard drives, laptops, servers, handheld digital devices and on storage media like CDs and backup tapes.

3. Parties in actions which involve e-discovery should consult and have regard to the document titled "The Sedona Canada Principles Addressing Electronic Discovery." The Sedona Canada Working Group, composed of lawyers, judges and technologists, spent sixteen months carefully studying issues relating to e-discovery in Canada and, from that careful study, developed and produced this comprehensive document which can be found at: http://www.lexum.org/e-discovery/SedonaCanadaPrinciples01-08.pdf.

4. In accordance with Queen's Bench rule 5-7 the following Guidelines, which incorporate the Sedona Canada Principles, are intended to apply to the disclosure, discovery and inspection of electronic documents, except where they specifically conflict with The Queen's Bench Rules of Court. However, one concept that has emerged from the study of e-discovery in Canada to date is that traditional rules relating to relevance of documents cannot be uniformly applied to e-discovery. For this reason, the Guidelines incorporate a new standard for e-discovery disclosure which might be described as proportionate direct relevance.

5. The objective of the Guidelines is to guide lawyers, parties and the judiciary in the e-discovery process. It is intended that the Guidelines provide an appropriate framework to address *how* to conduct e-discovery, based on norms that the bench and bar can adopt and develop over time as a matter of practice. At this stage, mandating how e-discovery is conducted through the enactment of detailed rules could be counter-productive. In due course, as experience is gained in this area in Saskatchewan and in other jurisdictions in Canada, rules specific to e-discovery may be developed.

Chief Justice M. D. Popescul

APPENDIX TO PRACTICE DIRECTIVE CIV-PD #1

GUIDELINES

<u>Scope</u>

Principle 1: In general, and subject to the following principles, electronic documents that are relevant to any matter in question in the action must be disclosed in accordance with Part 5 of *The Queen's Bench Rules*.

Commentary:

Electronic documents are included in the definition of "document" contained in Rule 17-1 of *The Queen's Bench Rules* and must therefore be disclosed in accordance with Part 5 of *The Queen's Bench Rules*.

Principle 2: The obligations of the parties with respect to discovery and inspection of electronic documents, including the cost associated with locating electronic documents, should be proportionate to the importance and complexity of the issues, and to the amount involved, in the action.

Commentary:

The concept of proportionality is a central tenet of both The Queen`s Bench Rules of Court (Q.B Rule 1-3(4)) and The Sedona Canada Principles Addressing Electronic Discovery. The concept of proportionality has been introduced into the rules of procedure of most superior courts in Canada and has been described as a reaction to delays and costs impeding access to justice.

The application of this principle depends, in the first instance, on the parties who should confer about the concept of proportionality and attempt to agree upon its application to an action. If the parties are unable to agree, and a party can demonstrate that the likely probative value of a document is outweighed by the cost associated with locating the document, the party should not be obliged to locate the document at issue.

Principle 3: **In most cases, the primary location in which to search for electronic documents should be the parties' active data and any other information that was stored in a manner that anticipated future business use, and that still permits efficient searching and retrieval.**

Commentary:

The scope of searches required for relevant electronic documents must be reasonable. It is neither reasonable nor feasible to require that litigants immediately or always canvass all potential sources of electronic documents in the course of locating, preserving and producing them in the discovery process.

For most litigation, the relevant electronic documents will be those which are available to or viewed by computer users and those which are exchanged between parties in the ordinary course of business (active data). This principle also includes archival data (electronic documents organized and maintained for long-term storage and record keeping purposes) that is still readily accessible.

Principle 4: **A party should not be required to search for, review or produce documents that are deleted or hidden, or residual data such as fragmented or overwritten files, absent agreement or an order based on demonstrated need and relevance. In certain actions, a party may satisfy its obligations relating to discovery and inspection of electronic documents by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify the documents that are most likely to contain relevant data or information.**

Commentary:

Only exceptional cases will turn on deleted or discarded electronic documents. As such, residual or replicant data need not be preserved or produced absent

agreement or an order of the Court. In an action where deleted or residual electronic documents may be relevant, the parties should communicate this information to one another early in the process to avoid unnecessary preservation, inadvertent deletion and/or claims of spoliation.

Large computer systems contain vast amounts of information, much of which is likely to be irrelevant. In some actions, it may therefore be impractical or too expensive to review all of the information for relevance. In such circumstances, it is reasonable for parties to use targeted electronic techniques to search within electronic document sources, in collecting the materials that will be subject to detailed review for relevance. The objective should be to identify a subset or subsets of the available electronic documents for detailed review, that are most likely to be relevant.

The application of this principle depends, in the first instance, on the parties who should confer about and attempt to agree upon about the use of targeted electronic search techniques, including search criteria to be used to extract relevant electronic documents.

<u>Preservation</u>

Principle 5: As soon as litigation is contemplated or threatened, parties should immediately take reasonable and good faith steps to preserve relevant electronic documents.

- **Parties should discuss the need to preserve meta-data as early as possible. A party should be entitled to assume that its meta-data is not relevant unless it knows that its meta-data is relevant**
- **Parties should discuss the need to preserve an electronic document in electronic form as early as possible. A party should be entitled to assume that it is sufficient for it to preserve a print copy of an electronic document unless it knows that the other party requires the preservation of a specific electronic document in electronic form.**

Commentary:

The obligation to preserve relevant electronic documents applies to both parties as soon as litigation is contemplated or threatened, however, the obligation is not unlimited. The scope of what is to be preserved and the steps considered reasonable may vary widely depending upon the nature of the claims and documents at issue. A reasonable inquiry based on good faith to identify and preserve active and archival data should be sufficient.

"Meta-data" is electronic information that is recorded by the system about a particular document, concerning its format, and how, when, and by whom it was

created, saved, accessed, or modified. Parties should confer about and attempt to agree upon the need to preserve meta-data as early as possible.

In most actions, meta-data will not be relevant. For this reason, a party should be entitled to assume that its meta-data is not relevant (and need not be preserved) unless it knows that its meta-data is relevant.

Parties should confer about and attempt to agree upon the need to preserve electronic documents in electronic form as early as possible.

In most actions, preservation of electronic documents in paper format or scanned format should be sufficient and preservation of electronic copies of actual files, other than through normal business practices, should not be required. For this reason, a party should be entitled to assume that it is sufficient for it to preserve a print or scanned copy of an electronic document unless it knows that the other party requires the preservation of a specific electronic document in electronic form.

Principle 6: Because of the nature of electronic documents, parties should consider whether third parties may be in possession of relevant electronic documents and may wish to consider placing any such third parties on notice with respect to preserving electronic documents as early in the process as possible, as electronic documents may be lost in the ordinary course of business.

Commentary:
Where a party anticipates that a specific electronic document does or may exist in the possession of a third party that is relevant to an action and that is liable to be deleted or modified in the ordinary course of business, the party may wish to consider notifying the third party of that fact and requesting that appropriate steps be taken to preserve the electronic document.

<u>Production</u>
Principle 7: Where an electronic document has been preserved in electronic form, it may be producible in electronic form where this would (i) provide more complete relevant information, (ii) facilitate access to the information in the document, by means of electronic techniques to review, search, or otherwise use the document in the litigation process, (iii) minimize the costs to the producing party, or (iv) preserve the integrity and security of the data.

Commentary:
As noted in the commentary following principle 5 above, there is generally no requirement to preserve electronic documents in electronic form. Having said this, where an electronic document has been preserved in electronic form, it may also be producible in electronic form under the circumstances described in this principle. Parties should confer about and attempt to agree upon issues relating to production of electronic documents.

Costs

Principle 8: **In general, the interim costs of preservation, retrieval, review, and production of electronic documents will be borne by the party producing them. The other party will be required to incur the interim cost of making a copy, for its own use, of the resulting productions. In special circumstances, it may be appropriate for the parties to agree and/or for the Court to order a different allocation of costs on an interim basis.**

Commentary:
This principle accords with the existing practice followed in Saskatchewan in relation to the costs associated with the disclosure and production of documents. The special circumstances referred to in this principle could include situations where a party requests disclosure that involves extraordinary cost for the other party such as disclosure requiring forensic searches, disclosure requiring extensive backup restoration work or disclosure requiring the creation of subsets of data that do not exist in the normal business environment.

Confer

Principle 9: **Parties should confer as soon as practicable and on an ongoing basis and, in any event, prior to examinations for discovery, regarding the location, preservation, review and production of electronic documents (including measures to protect privilege and confidentiality and other objections to production of electronic documents) and should seek to agree on the substance of each party's rights and obligations with respect to e-discovery, and on procedures required to give effect to those rights and obligations. Where parties are unable to agree on issues surrounding the use of technology for the preparation and management of civil litigation in the Court, they should be governed by the default standard specified in the Canadian Judicial Council's National Generic Protocol on the Use of Technology in Civil Litigation.**

Commentary:

Conferring early is one of the keys to effective e-discovery for all parties. By identifying and attempting to resolve disputes about e-discovery issues at an early stage in an action, parties can avoid costly collateral litigation relating to these disputes.

In recognition of the central importance of this principle, the obligation to confer is referenced throughout the commentaries to the other principles set out above. Parties should confer and attempt to agree on all substantive and procedural issues relating to e-discovery, including but not limited to (i) the concept of proportionality and its application to an action, (ii) the relevance of and the need to preserve deleted or residual electronic documents and meta-data and the need to preserve and/or produce specific electronic documents in electronic form, (iii) the use of targeted electronic search techniques, (iv) issues relating to production of electronic documents including the format for document numbering and production, and (v) any proposed change to the normal allocation of costs.

Parties should confer and attempt to agree on issues surrounding the use of technology for the preparation and management of civil litigation in the Court. Where parties are unable to agree, they should be governed by the default standard specified in the Canadian Judicial Council's National Generic Protocol on the Use of Technology in Civil Litigation which can be found at:
http://www.cjc-ccm.gc.ca/cmslibgeneralJTAC%20National%20Generic%20Proto(1).pdf,
subject to amendments by order of the Court or by further agreement of the parties.

Any agreement reached should be reduced to writing for future reference when necessary.

Principle 10: Where parties are unable to agree on the substance of each party's rights and obligations with respect to e-discovery and on procedures required to give effect to those rights and obligations, either party may make an appearance day application to the court in accordance with Subdivision 3 of Part 6 of *The Queen's Bench* to address these issues.

Commentary:

The parties' obligation to confer on issues relating to e-discovery is a real obligation. Parties are expected to actually confer and to genuinely attempt to agree on substantive and procedural issues relating to e-discovery before completing a joint request for a post pleadings conference as described in this principle.

Default Protocol on the Use of Technology in Civil Litigation

The Guidelines are intended to apply to actions which involve e-discovery in Saskatchewan but do not address the use of electronic evidence. Parties should confer and attempt to agree on issues surrounding the use of technology for the preparation and management of civil litigation in the Court.

Where parties are unable to agree, they should be governed by the default standard specified in the Canadian Judicial Council's National Generic Protocol on the Use of Technology in Civil Litigation which can be found at: http://www.cjc-ccm.gc.ca/cmslib/general/ JTAC%20National%20Generic%20Proto(1).pdf, subject to amendments by order of the Court or by further agreement of the parties.